Corrections Corporation of America, d/b/a Servicios Correccionales de Puerto Rico *and* Union General de Trabajadores de Puerto Rico. Case 24–CA–8381

February 18, 2000

DECISION AND ORDER

BY MEMBERS FOX, HURTGEN, AND BRAME

Pursuant to a charge filed on July 12, 1999, and an amended charge filed on September 16, 1999,[1] the General Counsel of the National Labor Relations Board issued a complaint on September 30, 1999, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 24–RC–7936. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint and asserting affirmative defenses.

On November 26, 1999, the General Counsel filed a Motion for Summary Judgment. On November 26, 1999, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer the Respondent admits its refusal to bargain, but attacks the validity of the certification on the basis of the Board's unit determination in the representation proceeding. Specifically, the Respondent renews its contentions, raised and rejected in the representation case, that the social penal workers included in the certified unit are statutory supervisors and/or guards, and therefore the unit is inappropriate for bargaining.[2]

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Delaware corporation authorized to do business in the Commonwealth of Puerto Rico, with an office and place of business in Guayama, Puerto Rico, has been engaged in the operation and management of several correctional facilities in the Commonwealth of Puerto Rico. During the 12-month period immediately preceding issuance of the complaint, the Respondent, in conducting its business operations described above, derived gross revenues in excess of $50,000 and purchased and received at its Guayama, Puerto Rico facility goods valued in excess of $50,000 directly from points outside the Commonwealth of Puerto Rico. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.[3]

[1] The Respondent's answer to the complaint denies that the original charge was served on the Respondent on July 12, 1999, and denies knowledge of service on the Respondent of the amended charge on September 16, 1999. The General Counsel, however, has attached to the motion copies of the charge and amended charge, and affidavits of service and copies of postal return receipts for each of them. The Respondent has not challenged the authenticity of those documents in response to the Notice to Show Cause.

[2] In its answer to the complaint, the Respondent states as an affirmative defense that it does not employ persons with the classification of "social penal workers." In arguing in the representation case that employees in the petitioned-for classification of social penal workers were statutory supervisors, the Respondent asserted that the correct designation for these employees is "social penal supervisors." The Regional Director in the representation case expressly rejected the Respondent's contention that it has no social penal "workers," but rather only social penal "supervisors," and this finding was affirmed by the Board. Thus, this affirmative defense raises no issue that is properly litigable in the instant proceeding, and instead merely constitutes a reiteration of the Respondent's contention that these employees are statutory supervisors.

[3] The Respondent's answer to the complaint denies that it is a Delaware corporation. The Respondent, however, did not contest the Regional Director's finding in the underlying representation case that the Respondent is a Delaware corporation. Accordingly, we find that this denial does not raise an issue that is properly litigable in this proceeding. The Respondent's answer also neither admits nor denies the complaint allegations that the Respondent is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act, and that the Union is a labor organization, on the grounds that each of these allegations "is a conclusion of law that pertains to the administrative law judge." The Respondent, however, stipulated to the Union's labor organization status in the representation case, and has alleged no facts that would put that status in question. With respect to the Respondent's status as an employer under the Act, the Board found in the representation case that the Respondent had not properly and timely raised the issue of the Board's discretionary jurisdiction because the Respondent had not raised that issue in the representation case hearing or in its post-hearing brief. Further, in the representation proceeding the Board rejected the Respondent's contention that the Board lacked statutory jurisdiction over it. In addition, the Respondent's answer admits the commerce facts alleged in the complaint as the factual bases of the allegation that the Respondent is an employer within the meaning of the Act. Accordingly, we find that the Respondent's answer as to these matters does not raise an issue warranting a hearing, and that the Board has jurisdiction over the Respondent.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the election held April 17, 1998, the Union was certified on April 28, 1999, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> INCLUDED: All nonprofessional employees employed by the Employer at its correctional facilities in Guayama, Puerto Rico, including licensed practical nurses, office clerical employees, administrative clerks, secretaries, commissary clerks, food service workers, mail room clerk, inmate criminal records clerks, medical records clerks, library aide, dental hygienist, hygienist, receptionist, pharmacist assistants, computer lab technician, social penal workers, and maintenance workers.
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> EXCLUDED: All professional employees, secretaries to the warden and assistant warden, administrative clerk to chief of security, administrative clerk in the personnel office, guards, and supervisors as defined by the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

By memorandum dated July 6, 1999, the Respondent changed the work schedule of its socio penal workers,[4] also referred to by the Respondent as "socio penal supervisors," effective on July 25, 1999. This subject relates to wages, hours, and other terms and conditions of employment of the unit employees and is a mandatory subject for the purposes of collective bargaining. The Respondent changed the socio penal workers' work schedules without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent concerning this conduct and its effects. On about July 16, 1999, the Union requested the Respondent to bargain collectively about the change in work schedule of the socio penal workers described above, and, since about July 16, 1999, the Respondent has refused to do so.[5] Further, since on about July 16, 1999, the Respondent has failed and refused to recognize the Union as the exclusive collective-bargaining representative of those unit employees classified as social penal workers. We find that these refusals constitute unlawful refusals to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after July 16, 1999, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement. We also shall order the Respondent to rescind the July 1999 change in the schedules of the social penal workers, and restore the status quo ante regarding their schedules. In addition, we shall order the Respondent to make employees whole for any losses they may have suffered as a result of the Respondent's unlawful unilateral change in the work schedule.[6] Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co*., 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co*., 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Corrections Corporation of America, d/b/a Servicios Correccionales de Puerto Rico, Guayama, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Union General de Trabajadores de Puerto Rico as the exclusive bargaining representative of the employees in the bargaining unit.

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[4] The complaint uses the term "socio penal workers" to describe the social penal workers included in the certified unit. This difference in designation does not affect our consideration of the issues presented by the complaint, and we shall use those terms interchangeably in this decision.

[5] In its answer, the Respondent denies the complaint's factual allegations that on July 6, 1999, the Respondent changed the work hours of its social penal workers, that this change was made without notice to and bargaining with the Union, and that the Union requested bargaining concerning the change in hours. These denials do not warrant a hearing as uncontroverted record evidence in the form of documents attached to the General Counsel's motion establishes the General Counsel's allegations regarding these matters. Thus, the record contains the Respondent's July 6, 1999 memorandum to social penal employees announcing the change in their work schedules, and the Respondent's July 16, 1999 letter to the Union, which states the Respondent's position that those employees are "not covered in any of the appropriate units certified by the National Labor Relations Board," and that therefore "the changes in the terms and conditions of said employees are an administrative prerogative." Implicit in this letter is the admission that the Union previously had requested bargaining regarding the change in work schedules.

[6] See *Grand Rapids Press*, 325 NLRB 915, 916 (1998).

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, including the work schedules of social penal workers, and if an understanding is reached, embody the understanding in a signed agreement:

> INCLUDED: All nonprofessional employees employed by the Employer at its correctional facilities in Guayama, Puerto Rico, including licensed practical nurses, office clerical employees, administrative clerks, secretaries, commissary clerks, food service workers, mail room clerk, inmate criminal records clerks, medical records clerks, library aide, dental hygienist, hygienist, receptionist, pharmacist assistants, computer lab technician, social penal workers, and maintenance workers.
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> EXCLUDED: All professional employees, secretaries to the warden and assistant warden, administrative clerk to chief of security, administrative clerk in the personnel office, guards, and supervisors as defined by the Act.

(b) On request, rescind the change in the work schedules of the social penal workers announced on July 6, 1999, as being effective on July 25, 1999, and restore the schedules as they existed prior to this unlawful change.

(c) Make whole the social penal workers and any other unit employees for any losses they suffered as a result of the Respondent's unlawful unilateral change in their work schedules described above, as set forth in the remedy section of this decision.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Guayama, Puerto Rico, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 24 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 16, 1999.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER BRAME, dissenting.

In the underlying representation proceeding, I dissented from my colleagues' denial of the Employer's request for review of the Regional Director's Decision and Direction of Election. Contrary to my colleagues, I found that the Employer's request for review raised substantial issues with respect to the alleged supervisory and guard status of the social penal supervisors, also referred to as social penal workers. Thus, in the representation case, I would have permitted the social penal supervisors to vote subject to challenge and resolved their status postelection. Accordingly, I dissent here from my colleagues' granting the General Counsel's Motion for Summary Judgment and their finding that the Respondent violated Section 8(a)(5) and (1) of the Act in this certification-testing proceeding.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Union General de Trabajadores de Puerto Rico as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, including the work schedules of social penal workers, and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

INCLUDED: All nonprofessional employees employed by the Employer at its correctional facilities in Guayama, Puerto Rico, including licensed practical nurses, office clerical employees, administrative clerks, secretaries, commissary clerks, food service workers, mail room clerk, inmate criminal records clerks, medical records clerks, library aide, dental hygienist, hygienist, receptionist, pharmacist assistants, computer lab technician, social penal workers, and maintenance workers.

EXCLUDED: All professional employees, secretaries to the warden and assistant warden, administrative clerk to chief of security, administrative clerk in the personnel office, guards, and supervisors as defined by the Act.

WE WILL, on request, rescind the change in the work schedules of the social penal workers announced on July 6, 1999, as being effective on July 25, 1999, and WE WILL restore the schedules as they existed prior to this unlawful change.

WE WILL make whole the social penal workers and any other unit employees for any losses they suffered as a result of our unlawful unilateral change in their work schedules described above, with interest.

CORRECTIONS CORPORATION OF AMERICA, D/B/A
SERVICIOS CORRECCIONALES DE PUERTO RICO